STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Jansen, P.J. and Holbrook, Jr., and Griffin, J.J.)

DENISE BRYANT, Personal Representative of the Estate of CATHERINE HUNT, Deceased

Plaintiff-Appellee,

v

OAKPOINTE VILLA NURSING CENTRE, INC., a Michigan corporation,

Defendant-Appellant.
_____/

Supreme Court No. 121723

Court of Appeals No. 228972

Wayne County Circuit Court
No. 98-810412 NO

STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Jansen, P.J. and Holbrook, Jr., and Griffin, J.J.)

DENISE BRYANT, Personal Representative of the Estate of CATHERINE HUNT, Deceased

Plaintiff-Appellee,

V

OAKPOINTE VILLA NURSING CENTRE, INC., a Michigan corporation

Defendant-Appellant.
_____/

Supreme Court No. 121724

Court of Appeals No. 234992

Wayne County Circuit Court
No. 01-104360 NH

REPLY BRIEF FOR OAKPOINTE VILLA NURSING CENTRE, INC.

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ARGUMENT

I THIS ACTION AGAINST A SKILLED NURSING FACILITY FOR FAILURE TO RECOGNIZE OR PREVENT A RISK TO A PATIENT OF POSITIONAL ASPHYXIA POSED BY A RESTRAINT DUE TO THE PATIENT'S MEDICAL CONDITION, IS AN ACTION FOR MEDICAL MALPRACTICE .

Plaintiff's assertion that Regalski v Cardiology Associates, PC, 459 Mich 881; 587 NW2d 502 (1998), was wrongly decided because it is inconsistent with other decisions by this Court is without merit. None of the decisions cited by plaintiff directly deal with the import of the phrase "employee or agent of a hospital or licensed health care facility who is engaging in or otherwise assisting medical care and treatment . . . " in MCL 600.5838a. This Court's decision in Regalski v Cardiology Associates, PC, 459 Mich 891; 587 NW2d 502 (1998), while brief, concisely and directly addresses this language. The decision properly applies that phrase to conclude, in context, that a claim against an unlicensed "employee or agent of a hospital or licensed health care facility who is engaging in or otherwise assisting medical care and treatment . . . " is a claim for medical malpractice, without the need for further analysis.

The earlier decisions by this Court which discuss in other contexts the import of amendments to the malpractice statute of limitations do not address this statutory phrase. As noted by defendant in its principal brief (p 14), the observation in Adkins v Annapolis Hospital, 420 Mich 87, 95, n10; 360 NW2d 350 (1984), that some errors in hospital care may be ordinary negligence rather than malpractice, was dicta. In making that statement, the Court specifically noted that there was no issue or argument raised by the plaintiff in the appeal before the Supreme Court in Adkins as to whether the care at issue was ordinary negligence or malpractice. Id.

Similarly, Sam v Balardo, 411 Mich 405; 308 NW2d 142 (1981), dealt with the question of the statute of limitations applicable to legal malpractice actions, without regard to the relevance, if any, of a distinction between professional and ordinary errors by attorneys in

the rendition of professional services. Discussion regarding the medical malpractice statute of limitations there too was dicta.

Likewise, Dennis v Robins Funeral Home, 428 Mich 698; 411 NW2d 156 (1987), dealt with the question of the limitations period applicable to a claim against a mortician. It had nothing to do with evaluating the impact of language in the medical malpractice statute of limitations accrual provision. That provision contemplates that malpractice could be committed not only by licensed health care professionals, but also by an unlicensed agent or employee of a licensed health care facility "who is engaging in or otherwise assisting in medical care and treatment." MCL 600.5838a.

Plaintiff's argument would render this language in MCL 600.5838a meaningless. It is a fundamental principle of statutory interpretation that in "reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." Wickens v Oakwood Health Care System, 465 Mich 53, 60; 631 NW2d 686 (2001). The clear import of this language is that medical malpractice can be committed by agents or employees, licensed or unlicensed, who are "otherwise assisting in medical care and treatment" in a licensed health care facility. The Legislature thereby extended the statutory protections applicable to medical malpractice actions to errors made by those unlicensed employees who are assisting in medical care and treatment. This is regardless of whether the agent or employee is directly exercising professional judgment, or merely implementing a decision by another health care provider made in the exercise of such judgment.

Without merit is plaintiff's assertion that this could not be a medical malpractice claim because it does not involve "otherwise assisting" in "medical care and treatment" within the meaning of MCL 600.5838a. As detailed in defendant's principal brief, the application and

monitoring of patient restraints is fundamentally an issue of medical care and treatment. Plaintiff's argument that this was a question of a "dangerous environment" and not of medical judgment continues to be misguided. As clearly asserted by plaintiff's own physician expert, Dr. Miles, the "environment" allegedly presented a risk of injury to this particular patient only because of the presence of physician- ordered bed rails (a restraint), in combination with the patient's particular mental and physical condition for which she was eligible for and receiving skilled nursing care as a resident in a skilled nursing facility. Defendant and its staff had an obligation to recognize and address that risk according to plaintiff's expert, Dr. Miles, only because of the skilled nursing facility patient relationship, and only because of this patient's specific medical condition.

Plaintiff's reliance on Hammack v Lutheran Social Services of Michigan, 211 Mich App 1; 535 NW2d 215 (1995) is also misplaced. The opinion does not indicate that the injured developmentally disabled adult was in a skilled nursing facility (as opposed to an assisted living or adult foster care environment). It did not address whether the claim being asserted was in actuality a claim against licensed health professional or licensed health facility, or for malpractice. Finally, the case was decided on premises liability principles before premises liability law was clarified in Michigan as a result of Lugo v Ameritech Corp, Inc, 464 Mich 512; 629 NW2d 384 (2001).

Plaintiff's assertion that defendant's source of duty/professional relationship analysis is inconsistent with the discussion of vicarious liability in Cox v Flint Board of Hospital Managers, 467 Mich 1; 651 NW2d 356 (2002), is misguided. The issue in Cox was whether, in light of the proofs at trial in that matter, the jury properly was instructed that it could hold the hospital liable for the professional negligence of a "unit of a hospital." The Court held that the jury should not have been instructed on direct negligence of a unit of the hospital

because, while there can be claims for either vicarious liability or "direct negligence" on the part of a hospital, plaintiff's theory in Cox was based solely on vicarious liability for the errors of individual health care providers:

> Crucial to any medical malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship. Dorris v Detroit Osteopathic Hospital Corp, 460 Mich 26, 45; 594 NW2d 455 (1999), citing Bronson v Sisters of Mercy Health Corp, 175 Mich App 647, 652; 452 NW2d 276 (1989). A hospital may be (1) directly liable for malpractice, through claims of negligent supervision of staff physicians as well as selection and retention of medical staff, or (2) vicariously liable for the negligence of its agents. Id.; Theophelis v Lansing General Hospital, 430 Mich 473, 478, n3; 424 NW2d 478 (1988) (opinion by Griffin, J.). Here, plaintiffs have not advanced claims for direct negligence on the part of the defendant hospital. Therefore, defendant's liability must rest on a theory of vicarious liability. [Cox, supra.]

Plaintiffs' assertion that Cox "unequivocally instructs that a medical malpractice claim cannot be premised on the performance of a hospital unit or the performance of the hospital itself," therefore, is not accurate.

Indeed, plaintiff here has asserted claims of direct liability both in the first amended complaint and in her brief on appeal in characterizing her claim. In paragraph 10(b) of the first amended complaint, plaintiff has asserted what is clearly a claim of direct negligence—that Oakpointe breached its duty to plaintiff in "negligently and recklessly failing to train CNAs to assess the risk of positional asphyxia by plaintiff's decedent . . . . " Such claims of negligent supervision or training are claims for medical malpractice. Bronson v Sisters of Mercy Health Corp, 175 Mich App 647, 652; 452 NW2d 276 (1989). Paragraphs 10(a) and (d) assert breaches of duty which can be viewed as either direct or vicarious, in "negligently and recklessly failing to assure that plaintiff's decedent was provided with an accident-free environment", and "negligently and recklessly failing to inspect the beds, bed frames and mattresses to assure that the risk of positional asphyxia did not exist for plaintiff's decedent." (Appendix 22a.)

This dovetails into defendant's source of duty/professional relationship analysis.

While the duty to inspect the beds for risk of positional asphyxia perhaps at the lowest level might be assigned institutionally to a maintenance man, the duty to plaintiff to ensure that this is done would rest with the nursing home as an institution. The maintenance man would certainly have no relationship with plaintiff as would give rise to a duty for which he could be directly sued, or upon which a claim for pure vicarious liability would rest.

Indeed, the claimed duty to maintain an accident free environment is a duty asserted by plaintiff in her brief to exist based on (unpled) administrative regulations applicable to skilled nursing facilities, not directly to the employees of those institutions. Based on the allegations in the complaint and discovery, and plaintiff's own characterizations on appeal of her claim, the duties claimed to be owed exist only because of the professional health care facility/patient relationship.

Even as to plaintiff's alternative theory based on negligence of the CNA in failing to recognize or report the risk of positional asphyxiation, the only relationship which would give rise to such a direct duty by the CNA to plaintiff would be that of certified health professional to patient.[1]

Moreover, as declared by the Court of Appeals in Eubanks v Henry Ford Hospital, unpublished opinion per curiam of the Court of Appeals, rel'd 8/27/02 (docket nos 233159, 233417) (copy attached), "Although there are some questions of ordinary negligence involved, those questions flow from predominating medical malpractice issues and are too intertwined with malpractice theory for a meaningful division." Id. As such, the case should be treated, procedurally, in its entirety as a claim for malpractice. Where the overriding

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[1] It is evident from plaintiff's own factual rendition that she will not likely seriously pursue this theory. Plaintiff relies heavily on evidence that the CNA in fact told the licensed nurse of a potential problem, but that the nurse elected to do nothing (clearly a claim of nursing malpractice).

source of the duty to recognize and address the risk of positional asphyxia is the professional health care provider- or health care facility- relationship, the claim is predominantly one for malpractice.

As noted in defendant's principal brief, a legal malpractice claim based on the failure to file a complaint within the statute of limitations context provides a compelling analogy. Regardless of whether the failure to file timely is due to the erroneous exercise of professional judgment (as by the attorney in determining what statute applies) or to "ordinary negligence" (as by the secretary in failing to follow the attorney's instruction to file the complaint on a certain day), the claim still fundamentally is one for malpractice based on the source of the duty which predominates.

Also without merit is plaintiff's argument that this cannot be a claim for malpractice because there could be no individual who would meet the requirements of the affidavit of merit statute, or of the medical malpractice expert witness statute. MCL 600.2912d requires that a medical malpractice complaint be accompanied by an affidavit of merit by a "health professional" whom the plaintiff reasonably believes "meets the requirements for an expert witness" under MCL 600.2169.

First, even if plaintiff were correct that the affidavit of merit requirement factually could not be complied with here (which is denied), this would not affect the propriety of the dismissal of the "ordinary negligence" action. Other tort reform requirements, such as the mailing of a notice of intent pursuant to MCL 600.2912b, were not complied with and, therefore, required dismissal regardless of the affidavit of merit requirement. Dorris v Detroit Osteopathic Hospital, 460 Mich 210; 594 NW2d 445 (1999).

Moreover, plaintiff's argument is factually inaccurate and inapplicable here in any event. When plaintiff did finally file a complaint specifically alleging medical malpractice (in

docket number 01-104360 NH), plaintiff did also file an affidavit of merit by a nurse (Appx 114a-116a). Thus it was possible to comply with the affidavit of merit statute. Nurses, as well as nursing home administrators, are licensed health professionals who would clearly qualify to execute an affidavit of merit within the meaning of MCL 600.2169(1), and MCL 600.2912d. See MCL 333.17307 (licensure and practice of nursing home administrator), MCL 333.17211 (licensure required for practice of nursing.)

Even if plaintiff were here advancing a theory based solely on vicarious liability for the alleged misconduct of an unlicensed health professional, such as a CNA, compliance with MCL 600.2912d and 600.2169 would be both required and possible. (Of course, as noted above, plaintiff has in the first amended complaint in this matter also asserted claims of direct negligence by this skilled nursing facility. Thus, this analysis is purely hypothetical and has no factual application to this matter.)

The affidavit of merit statute, MCL 600.2912d (Appx 156a), provides simply that the plaintiff must file with the complaint an affidavit of merit by a health professional "who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under §2169." MCL 600.2912d(1). The expert witness statute in turn provides, first, that an individual offering expert testimony must be a licensed health professional, MCL 600.2169(1), and second, that the witness must match the defendant in terms of clinical practice or teaching in the same health profession in which the defendant is licensed, MCL 600.2169(1)(a), (b) and (c) (copy attached).

In the context of a claim based solely on the malpractice of an unlicensed agent otherwise assisting in medical care and treatment, the first paragraph of MCL 600.2169(1) would require the affiant be a licensed health care professional. However, because a CNA, although certified, is not a licensed health professional, the "matching" requirements of

subsections 2169(1)(a)(b) and (c), which depend on licensure, arguably would not apply. The arguable inapplicability of the additional matching provisions of 2169(1)(a)(b) and (c), however, would not affect the applicability of the initial generic requirement of licensure in a health profession. Alternatively, an affidavit could be filed by a CNA, who the plaintiff arguably reasonably could believe to meet the requirements of 2169, regardless of licensure.

Thus, at a minimum, an affidavit of merit still would have to be filed by a health professional. Here, however, plaintiff did not file any affidavit of merit by any health professional with the complaint or first amended complaint in the "ordinary negligence" action, 98-810412 NO.

Also without merit is plaintiff's assertion, in reliance on Cox, that the affidavit of merit requirement specified in MCL 600.2912d is inapplicable to this case because the expert witness statute, MCL 600.2169 applies only to physicians, and not to other health professionals. First, as noted, this argument is irrelevant to the question of dismissal of the ordinary negligence action because plaintiff did not mail a notice of intent. Further, this argument was never raised by plaintiff below in opposing dismissal of the medical malpractice lawsuit (docket number 01-104360 NH).

Further, in substance, plaintiff's assertion is without merit. In Cox v Flint Board of Hospital Managers, the Court interpreted the statute defining the standard of practice of specialists and general practitioners as local or national, MCL 600.2912a. The Court held within that specific context of the practice of medicine that only physicians can be general practitioners or specialists. This analysis in Cox can have no application to the expert witness statute, MCL 600.2169, given the specific language of that statute.

First, unlike MCL 600.2912a, the language of MCL 600.2169 is not limited to "specialists" and "general practitioners." To the contrary, as set forth above, MCL

600.2169(1) first provides that an expert must be a licensed health care professional. The statute then goes on to impose criteria which require the expert to be licensed in, and either practice or teach in, the "same health profession." MCL 600.2169(1)(b). Additional requirements apply if the defendant is a general practitioner or a specialist.[2]

At a minimum, because plaintiff's allegations here involve both direct negligence by the nursing home in training, and negligence by a nurse supervisor in failing to appropriately act on the alleged complaints on the CNAs, affidavits of merit of a nursing home administrator and/or a nurse and/or CNA would have been required. In a situation where the specific sub-criteria of the expert witness statute could not be met (such as where the agent or employee is not a licensed health professional), then the affidavit of merit need only be by a person licensed as a health professional in this state or another state, pursuant to MCL 600.2169(1).

Regardless, however, dismissal of the ordinary negligence action was appropriate because plaintiff's claim is in actuality a claim for malpractice, and plaintiff did not serve a notice of intent prior to commencing this action.

II PLAINTIFF'S ASSERTION THAT UPON REVERSAL OF THE COURT OF APPEALS DECISION AND AFFIRMANCE OF DISMISSAL OF THE ORDINARY NEGLIGENCE ACTION, THE MEDICAL MALPRACTICE ACTION SHOULD BE REINSTATED, IS WITHOUT MERIT.

Plaintiff's assertion that upon reversal of the Court of Appeals' decision this matter should be reinstated as medical malpractice action is without merit. First, the Court of

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[2] Although not directly pertinent here, section 2169 does contemplate that for purposes expert witness qualifications, health professionals other than physicians could be considered general practitioners or specialists. This is because subsections 2169(1)(b) and 2169(1)(c) use the terms specialist and general practitioner in conjunction with also requiring licensure in the "same health profession." This clearly indicates that the specialist/general practitioner distinction exists in health professions other than just that of physician for purposes of expert witness qualifications.

barred by the statute of limitations (Appx 125a-126a). Plaintiff never filed an application for leave to appeal to this Court from the Court of Appeals' judgment.

While plaintiff argues now that the Court of Appeals erred in holding that the malpractice action was barred by the statute of limitations based on Cox and because the issue need not have been reached by the Court of Appeals as moot, that argument is not properly before this Court as no application for leave to appeal was filed.

CONCLUSION AND RELIEF REQUESTED

Accordingly, this is a medical malpractice action to which the tort reform requirements apply under any test recognized by the Michigan Legislature or the common law of this state. Defendant Oakpointe Villa Nursing Centre respectfully requests that this Court reverse in part that part of the Court of Appeals' opinion holding that plaintiff has a viable claim for ordinary negligence, and affirm the dismissal of the ordinary negligence suit (Docket No. 98-810412-NO) in its entirety for failure to comply with the tort reform requirements of a notice of intent and affidavit of merit. Defendant further requests that the Court leave intact that part of the Court of Appeals' judgment directing dismissal of the medical malpractice lawsuit as barred by the statute of limitations.

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Dated: NOVEMBER 20, 2003

STATE OF MICHIGAN

COURT OF APPEALS

LAVERNE G. EUBANKS, as Personal Representative of the Estate of PATRICIA GRAY,

Plaintiff-Appellee,

v

HENRY FORD HOSPITAL a/k/a HENRY FORD HEALTH SYSTEM,

Defendant-Appellant.

UNPUBLISHED
August 27, 2002

Nos. 233159, 233417
Wayne Circuit Court
LC No. 00-035125-NO

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

In this consolidated appeal, defendant Henry Ford Hospital appeals by leave granted two orders of the circuit court denying defendant's motion to change venue and granting in part defendant's motion for summary disposition, respectively. We affirm in part and remand in part for proceedings consistent with this opinion.

The decedent, Patricia Gray, was on a heart donor/recipient list to receive a heart transplant. On September 19, 1998, a potential heart became available; however, defendant's employees failed to contact Gray in time and the opportunity for the heart was lost. In December 1998, Gray suffered a heart attack and died. Plaintiff Laverne Eubanks, Gray's sister and the personal representative of Gray's estate, filed a complaint against defendant, claiming common-law negligence.

Defendant first argues that the trial court's decision to change venue was clearly erroneous and based on an incorrect determination of "original injury." See MCL 600.1629(1)(a). We agree that the trial court's determination of original injury was clear error but hold that the correct determination supports the trial court's ultimate conclusion.

"This Court reviews a trial court's ruling in response to a motion to change improper venue under the clearly erroneous standard." *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000), citing *Shock Bros, Inc v Morbark Industries, Inc*, 411 Mich 696, 698-699; 311 NW2d 722 (1981). A decision is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made. *Massey, supra* at 379.

In a wrongful death action, venue is determined pursuant to the terms of MCL 600.1629, stating, in relevant part:

> (1) . . . [I]n an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:
>
> (a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
>
> (i) The defendant resides, has a place of business, or conducts business in that county.
>
> (ii) The corporate registered office of a defendant is located in that county.

To determine venue, this statute looks first to the county where the "original injury" occurred. MCL 600.1629(1)(a). "Original injury" is not a defined term. However, in *Karpinsky v St John Hospital-Macomb Center Corp*, 238 Mich App 539, 543-545; 606 NW2d 45 (1999), we concluded that in a wrongful death case, the "original injury" is the injury resulting in death, rather than the death itself. *Id.* at 544. An original injury cannot ordinarily be an ongoing event. *Id.* at 546-547.

The trial court determined that the original injury occurred when defendant called Gray at her home, leaving a message that she lost the opportunity for the heart. Although there was evidence supporting the trial court's conclusion, we are left with the definite and firm conviction that a mistake was made; therefore, the decision was clearly erroneous. *In re Attorney Fees and Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). Based on the evidence adduced below, we conclude that the original injury eventually causing death was the missed opportunity when the heart was no longer available to Gray. The evidence supports the conclusion that the heart remained available to Gray until approximately 5:00 p.m. because it was not placed with another recipient. In addition, we conclude that the original injury took place at the hospital, located in Wayne County, where the decision was made that the heart was no longer available to Gray. Because the original injury occurred in Wayne County and defendant has a place of business there, venue was proper in Wayne County pursuant to MCL 600.1629(1)(a). Where the trial court reaches the right result, even if for the wrong reason, this Court will not reverse. *Koster v June's Trucking, Inc*, 244 Mich App 162, 167; 625 NW2d 82 (2000).

Nonetheless, the controlling issue in this case surrounds the trial court's order partially denying defendant's motion for summary disposition, brought pursuant to a variety of grounds, and granting plaintiff leave to amend her complaint. Defendant asserts that the court's decision was improper because plaintiff's entire claim sounds in medical malpractice and must be dismissed because plaintiff failed to file a notice of intent or affidavit of merit. We agree.

Claimants pursuing medical malpractice claims are required to provide written notice of the claim before filing a complaint, MCL 600.2912b, and to file an affidavit of merit with the complaint, MCL 600.2912d. See also *Nippa v Botsford General Hospital*, ___ Mich App ___; ___ NW2d ___ (Docket No. 229113, decided June 21, 2002), slip op 7 (medical malpractice plaintiff may not avoid expert testimony requirements of MCL 600.2169 by suing hospital entity

and not individual physicians), lv pending. The failure to comply with either requirement requires dismissal of the claim without prejudice. *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999); *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). Plaintiff failed to file a notice of intent before filing her complaint and failed to file an affidavit of merit with the complaint.

Plaintiff originally pleaded her claim as one of ordinary negligence, rather than medical malpractice. However, "[a] complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence." *Dorris, supra* at 43, quoting *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113, 115 (ED Mich, 1997). The determination whether a claim should be treated as a medical malpractice claim or an ordinary negligence claim "depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment." *Dorris, supra* at 45-46.

In this case, the complaint alleged that the hospital provided Gray a malfunctioning beeper and after the donor heart became available, hospital personnel failed to call all telephone numbers associated with Gray. It further alleged that defendant failed to have a sufficient protocol in place to contact potential heart recipients and that these negligent acts proximately caused Gray's death. In response to defendant's motion for summary disposition, the trial court concluded that part of the complaint, related to the existence of protocols, sounded in medical malpractice and allowed plaintiff to amend her complaint to bifurcate the ordinary negligence issues from the medical malpractice issues.

Alleged negligent actions by health professionals or individuals working for health professionals are not necessarily within the providence of "medical malpractice." See *Weaver v University of Michigan Bd of Regents*, 201 Mich App 239, 242; 506 NW2d 264 (1993); *Gold v Sinai Hospital of Detroit, Inc*, 5 Mich App 368, 370; 146 NW2d 723 (1966). However, even seemingly administrative acts can constitute medical malpractice rather than negligence. See, e.g., *Whitney v Gallagher*, 64 Mich App 46, 50-51; 235 NW2d 57 (1975); *Danner v Holy Cross Hospital*, 189 Mich App 397, 398; 474 NW2d 124 (1991); *Dorris, supra* at 46-47.

Applying the *Dorris* test to the complaint, we conclude that some of plaintiff's allegations are within the common knowledge and experience of the jury but others are not. See *Dorris, supra* at 45-46. A jury is doubtless competent to determine whether defendant's employees called all available numbers and whether they took adequate steps to ensure that the beeper was working properly before giving it to Gray. However, as plaintiff acknowledges, expert testimony will probably be required on the issue of probable cause. Moreover, whether defendant set up and followed adequate calling protocols for its heart transplant patients is almost certainly a question of professional medical judgment outside the common knowledge of the jury and requiring expert testimony. *Id.* at 47. We conclude that although there are some questions of ordinary negligence involved, those questions flow from predominating medical malpractice issues and are too intertwined with malpractice theory for a meaningful division. Therefore, the complaint should have been dismissed in its entirety. *Id.*

Affirmed in part and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

REVISED JUDICATURE ACT OF 1961 (EXCERPT)

Act 236 of 1961

600.2169 Qualifications of expert witness in action alleging medical malpractice; determination; disqualification of expert witness; testimony on contingency fee basis as misdemeanor; limitations applicable to discovery.

Sec. 2169.

(1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

(ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) Active clinical practice as a general practitioner.

(ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.

(2) In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:

(a) The educational and professional training of the expert witness.

(b) The area of specialization of the expert witness.

(c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.

(d) The relevancy of the expert witness's testimony.

(3) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

(4) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis. A person who violates this subsection is guilty of a misdemeanor.

(5) In an action alleging medical malpractice, all of the following limitations apply to discovery conducted by opposing counsel to determine whether or not an expert witness is qualified:

(a) Tax returns of the expert witness are not discoverable.

(b) Family members of the expert witness shall not be deposed concerning the amount of time the expert witness spends engaged in the practice of his or her health profession.

(c) A personal diary or calendar belonging to the expert witness is not discoverable. As used in this subdivision, "personal diary or calendar" means a diary or calendar that does not include listings or records of professional activities.

History: Add. 1986, Act 178, Eff. Oct. 1, 1986 ;--Am. 1993, Act 78, Eff. Apr. 1, 1994 .

Constitutionality: MCL 600.2169 is an enactment of substantive law. As such it does not impermissibly infringe the Supreme Court's constitutional rule-making authority over "practice and procedure." McDougall v Schanz, 461 Mich 15 (1999).

Compiler's Note: Section 3 of Act 178 of 1986 provides: "(1) Sections 2925b, 5805, 5838, and 5851 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to causes of action arising before October 1, 1986. "(2) Sections 1483, 5838a, and 6304 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to causes of action arising on or after October 1, 1986. "(3) Sections 1629, 1653, 2169, 2591, 2912c, 2912d, 2912e, 6098, 6301, 6303, 6305, 6306, 6307, 6309, and 6311 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after October 1, 1986. "(4) Sections 1651 and 6013 of Act No. 236 of the Public Acts of 1961, as amended by this amendatory act, shall not apply to cases filed before October 1, 1986. "(5) Chapter 49 of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed on or after January 1, 1987. "(6) Chapter 49a of Act No. 236 of the Public Acts of 1961, as added by this amendatory act, shall apply to cases filed in judicial circuits which are comprised of more than 1 county on or after July 1, 1990 and shall apply to cases filed in judicial circuits which are comprised of 1 county on or after October 1, 1988."

STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Jansen, P.J. and Holbrook, Jr., and Griffin, J.J.)

DENISE BRYANT, Personal Representative of the Estate of CATHERINE HUNT, Deceased

Plaintiff-Appellee,

v

OAKPOINTE VILLA NURSING CENTRE, INC., a Michigan corporation,

Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 228972

Wayne County Circuit Court
No. 98-810412 NO

STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Jansen, P.J. and Holbrook, Jr., and Griffin, J.J.)

DENISE BRYANT, Personal Representative of the Estate of CATHERINE HUNT, Deceased

Plaintiff-Appellee,

v

OAKPOINTE VILLA NURSING CENTRE, INC., a Michigan corporation

Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 234992

Wayne County Circuit Court
No. 01-104360 NH

AFFIDAVIT OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

LYNN A. LASHER, being first duly sworn, deposes and says that she is employed by the law firm of KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI and that on the 20th day of NOVEMBER 2003, she did serve upon:

MARK GRANZOTTO (P31492)
Attorney for Plaintiff
414 West Fifth Street
Royal Oak, MI 48067
(248) 546-4649

CAROL HOLMES (P35427)
Attorney for Oakpointe Villa Nursing Centre
125 South Broadway
Lake Orion, MI 48362
(248) 814-9004

the following documents:

REPLY BRIEF FOR OAKPOINTE VILLA NURSING CENTRE, INC.

AFFIDAVIT OF SERVICE

by having same enclosed in an envelope with postage thereon fully prepaid and deposited in a United States postal receptacle.

Further affiant saith not.

LYNN A. LASHER

Subscribed and sworn to before me
this 20th day of NOVEMBER 2003

Notary Public, Wayne County, MI
My Commission Expires:_____

TERRI L. ARCHER
Notary Public, Wayne County, MI
My Commission Expires Jan. 27, 2005